In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 500

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

This supplemental brief is filed with the permission of the Court granted at the close of oral argument. The Government avails itself of this permission in order to (1) Clarify its position concerning the applicability of the doctrine of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; and (2) Correct certain misstatements of fact made during the oral argument for respondent.

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I. APPLICABILITY OF THE CHANDLER-DUNBAR DOCTRINE

Under the Fifth Amendment a riparian proprietor is entitled, as is any landowner, to compensation equivalent to the fair market value of any *private* property rights taken from him. The Government denies, however, that respondent is possessed of any private property right, as against the Government, in the water power capable of being developed from the flow of the Hiwassee River at the site of Hiwassee Dam.

In any watercourse forming a part of an interstate highway of commerce, public and private rights coexist. The Government possesses the undoubted right to improve the watercourse in the interests of navigation, flood control, and general watershed development, and this right of improvement unquestionably extends to the erection of dams and other structures in nonnavigable as well as navigable portions of the stream. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508. The Government possesses the further right to regulate, supervise, or prohibit absolutely any private development—upon nonnavigable as upon navigable portions of the stream—which might adversely affect the public's interest in navigability and control of floodwaters. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690; *United States* v. *Utah*, 283 U. S. 64, 90. This right is one which has been

continuously asserted by Congress for more than forty years.[1]

Conversely, the private right, insofar as the utilization of water power is concerned, extends only—in nonnavigable as in navigable portions of the stream—to the erection of structures which either could have no adverse effect upon navigability or control of floodwaters, or which, though they could have such an effect, are erected *with the consent of and under license from the Federal Government.*

In *United States* v. *Chandler-Dunbar Co.*, this Court held that where the Government condemns land riparian to a navigable stream for the purpose of improving the stream in the interests of interstate commerce, the riparian proprietor, while entitled to full compensation for the ordinary value of the fast land, is entitled to "nothing for the water power" (*United States* v. *Appalachian Electric Power Company,* 311 U. S. 377, 427). The basis of the decision, as we read it, may be summarized in three propositions: (1) Power value could inhere in the land only if the

[1] Rivers and Harbors Act of 1899, c. 425, 30 Stat. 1121, 1151, § 10; Federal Water Power Act, c. 285, 41 Stat. 1063, as amended by the Act of August 26, 1935, c. 687, 49 Stat. 803, 838, 846, § 23; Tennessee Valley Authority Act of 1933, c. 32, 48 Stat. 58, as amended by the Act of August 1, 1935, c. 836, 49 Stat. 1075, 1079, § 26a.

riparian owner possessed an absolute right to erect structures in the stream for the purpose of harnessing its flow; (2) Since the Federal Government had undoubted power to prohibit the maintenance of such structures, the riparian owner possessed, as against it, not a property right but a possible privilege the exercise of which the Government might permit or forbid; (3) Destruction of such a privilege could not entitle the riparian owner to compensation, whether the destruction resulted from an exercise of the Government's negative power of prohibition or of its affirmative power to develop the stream in the interests of navigation and flood control.

The issue here is whether these principles must be deemed applicable only as respects sites located on the navigable portions of navigable streams. We think not. As we have already pointed out, where a site on a nonnavigable portion is so located that any private development would be capable of adversely affecting navigability and control of floodwaters in the navigable portion, governmental rights are as great as, and private rights no greater than, those that exist when the site is located on the navigable portion. The location is irrelevant to the legal situation and to the reasoning of the Court in the *Chandler-Dunbar* case. The relevant factor is the necessity of control in aid of navigation and flood control. This necessarily follows from the nature of rivers and the principles that govern their use. Indeed, in

the *Chandler-Dunbar* case the only limitation indicated by the Court was with respect to "a private stream wholly upon the lands of an individual." And the Court in deciding *United States* v. *Cress*, 243 U. S. 316, although reaching a result contrary to that in the *Chandler-Dunbar* case plainly stated that nothing in its decision turned upon the navigability or non-navigability of the stream at that point (p. 319):

> In passing upon this contention we may assume, without however deciding that the rights of defendants in error are no greater than if they had been riparian owners upon the rivers, instead of upon the tributary creeks.

But, as has been shown in our reply brief, it is the *Chandler-Dunbar* case that should govern rather than the *Cress* case, the authoritativeness of which is open to serious question, and which, in any event, is distinguishable upon its facts. (See Reply Brief, p. 6n.)

Accordingly, we submit that the doctrine of the *Chandler-Dunbar* case should apply wherever the Government *proves as a fact* that the site is one which could be valuable for private development only through the erection of structures capable of producing such an effect upon navigability and control of flood waters within an interrelated navigable waterway that the Government would have the right to control or prevent their erection. We do not contend, as was intimated by counsel for re-

spondent during oral argument, that the Government's power extends to every spring branch on every mountain tributary of a navigable river. We do contend that where, under legal principles which have long been established, a site is so situated that it can lawfully be developed by private interests only on obtaining Federal consent, there exists no private property right in the power capable of development at such site for which the Government must compensate if it decides that the site should be publicly developed in the primary interests of aiding navigation and controlling floods, rather than privately developed in the primary interests of producing power at the expense of navigation and control of floods. By undertaking this development itself the Government has refused to permit its undertaking by private parties. If the Government has the authority to do this, which is undisputed, it need pay only for the land value but not for the power value of the water arising solely by virtue of the exercise of lawful public authority. Respondent may not demand payment because of the possibility that he could have developed a project in violation of public right.

In this view, the question to be determined is whether the development contemplated by respondent would or would not have been capable of producing such an effect on the Federal interests in navigability and control of floodwaters in the navigable portion of the waterway as to

render it subject to Federal control or prohibition. On this question of fact, counsel for respondent stated in oral argument that the contemplated development could have no adverse effect on these Federal interests, but on the contrary would certainly have had a beneficial effect. The record, far from bearing out this statement, directly contradicts it.

There is not even the semblance of a dispute in the record on the proposition that the effect of respondent's proposed development on the Federal interest in flood control would have been such as to require strict regulation or prohibition of its construction and operation. Respondent's Exhibit 204 shows that the success of the Government's plan for controlling the flood waters of the Tennessee River System depends upon the control of each of the major tributaries by storage dams, of which Hiwassee Dam is one. In order to accomplish the Federal purpose, the storage and release of waters at each of these dams must be coordinated with the operation of every other unit in the system. It is clear that uncontrolled private operation of a development at the Hiwassee site might well destroy the effectiveness of the entire system. A private owner operating free from Federal control might well find it to his pecuniary advantage to release water on the crest of a flood in the river below, or to keep his reservoir full at a time when the storage space was required to halt a flood crest from above. All

doubt on this point should be removed by the testimony of the respondent and his witness Bevan, both of whom stated categorically that the contemplated operation for production of super primary power was "inconsistent with flood control" (R. 189, 490).

It is equally clear, despite counsel's unequivocal statement to the contrary, that respondent's contemplated methods of operation—the methods of operation on which depended the value which the site allegedly possessed for private development—would have had such an effect upon the navigable capacity of the navigable portion of the Hiwassee River as to require Federal control or prohibition of the development.[2]

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[2] We think it clear that the Government is not required to show that *every possible* method of operation would have had such an effect. It is enough to show that the possibilities of interference are sufficient to justify the assumption of control in order to prevent the possibilities from developing. The situation here is aptly summed up in the following question and answer taken from the cross-examination of the witness Barker (R. 559):

"Q. You see, I am questioning you not on the basis of an assumption. Try to follow my question, will you, please, and I think you will have no difficulty. I said, if you don't know the load factor at which the Appalachia development is going to be operated, then it must follow you don't know how much variation there will be in the flow through the Appalachia wheels, that is right, isn't it?

"A. That is correct that I don't know, and that is a very interesting point, too, because the Government would never know. There would be here a plant which has a capacity for doing a considerable damage to the navigable part of

The respondent himself testified that the demands of his customers might be of such a nature as to require him to operate his proposed system by completely shutting off the outflow during six months of the year and releasing during the other six (R. 85). He even introduced exhibits illustrating this proposed method of operation (Respondent's Exhibits 243 and 244). Such a method of operation would virtually have dried up the navigable portions of the Hiwassee River during certain periods (R. 546). All of the other methods of operation proposed by the respondent except one would have had similar effects, varying only in intensity and duration (R. 549–550). The only operation anywhere mentioned in the record which would not have had such an effect would be a continuous operation with no shut-downs. Of course, no generating plant operates in such a manner, and certainly not one designed, as was that on which respondent's whole theory of power value was based, to meet concentrated peaks by building up storage.

II. CORRECTIONS IN STATEMENTS OF FACT

(1) In oral argument counsel for respondent stated that Mr. Powelson, in giving his views as to the value for power purposes of the land in

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the Hiwassee and the Tennessee Rivers, and there is no way of knowing for sure to what extent that damage would be inflicted."

suit, did not base his opinion upon a capitalization of the predicted annual income shown on respondent's Exhibit 282. This statement is contradicted not only by the whole content of the respondent's direct testimony, but also by his express statement on cross-examination. When asked to explain how he arrived at his valuation of $7,500,000, he said that since one-third of the annual predicted surplus shown on respondent's Exhibit 282 is equal to six percent on $7,500,000, he valued the land at that figure, assigning the remaining two-thirds of the predicted surplus to those supplying the new money (R. 361–363). This is only another way of saying that he capitalized the predicted annual surplus at six percent and allocated one-third of the capitalized value to the land.[3]

The objection to this method of valuation is not only that it is speculative, but that the result represents not the present value of the land but its value if and when developed.

(2) In answer to a question from the Court counsel stated that the respondent had spent over one million dollars in acquiring *land and land rights.* The record does not support this statement. The cost of all the lands acquired by the respondent was $466,093.42 (Respondent's Ex-

[3] Respondent's only other witness on value (Bevan) pursued the same method. He predicted an annual surplus of $709,657, which if capitalized at six percent and divided by three will give his valuation figure of $4,000,000 (R. 496).

hibit 187), but this includes the cost not only of the land condemned but also of over 8,000 acres not condemned (Respondent's Exhibits 362 and 363). The actual cost of the land condemned was about $278,000. The remainder of the million-dollar expenditure included over $250,000 expended in connection with the small hydro-electric plant serving the town of Murphy, for which full compensation has already been paid, as well as such items as taxes, New York office expense, legal expense, and the expense of engineering studies of marketing possibilities, and various plans for development which respondent himself admitted were "out of date" at the time of the hearing before the Commission (R. 282).

(3) In argument, counsel for the respondent referred the Court to Petitioner's Exhibit O, appearing on page 1042 of the record. In making this reference, counsel inferred that this exhibit purported to show that the value of the respondent's lands was some $600,000, computed upon the basis of the prices paid by the Tennessee Valley Authority for other lands in the vicinity. There is no justification for this misuse of the exhibit.

It should first be noted that this exhibit is printed out of place in the record. In order therefore to understand its purpose and effect, it is necessary to refer to the testimony of the witness Sayford during which this exhibit was introduced as one of a series of tables identified as

Petitioner's Exhibits J to O, inclusive (R. 898–909). When Sayford's testimony is read as a whole, it is apparent that the only purpose of this series of tables was to show that the Commissioners had fallen into an error in attempting to compute the value of the land condemned by assigning to each acre of it *situated below the flood line* a value equivalent to the average per acre price paid by the Government for other property *also situated below the flood line.* The witness had already rejected the Commission formula as meaningless, pointing out that land to be acquired above the flood line is as necessary in the construction of a reservoir as land below that line and that, in consequence, particular tracts of land could not be deemed to have the same value merely because both lay below the flood line or both above it. The sole purpose of Petitioner's Exhibit O was to contrast the result reached by application of the Commission formula with the results shown on Petitioner's Exhibits K to N, and to demonstrate further that correct application of the formula, erroneous as was its basis, would result in a valuation less than one-half as great as that arrived at by the Commission as the result of an erroneous application.

If this Court desires to consider the prices paid by the Government for other lands in the area,

there is no reason for any confusion on the point since the record facts are undisputed.[4]

The facts are that the Government purchased from individual owners in the Hiwassee Reservoir a total of 10,440 acres for $444,913.00 (R. 898). This represented an average per acre price for all property, including urban property, improved property, mills, churches, and schools, of about $42.00. The average per acre price paid for lands similar to those of the respondent was between $24 and $28 (R. 909).

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WILLIAM C. FITTS, JR.,
General Counsel,
Tennessee Valley Authority.

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[4] This subject of prices paid for other lands was brought into the case over the vigorous opposition of the Government at the insistence of the Commissioners (R. 537–540, 636–640). The Government has insisted that the prices paid by a condemnor are never admissible in eminent domain proceedings, first, because such purchases are in the nature of compromises to avoid litigation, and second because the inquiry into such prices opens the door to a multitude of collateral issues. (See page 87 of the Government's principal brief.)

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